July
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12-415

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~357.~~ 96

WILLIAM B. DANIELS AND DENNIS M. DANIELS, PLAINTIFFS IN ERROR.

vs.

EDWARD TEARNEY AND WILLIAM L. WILSON, EXECUTORS OF COLIN C. PORTER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF JEFFERSON COUNTY, STATE OF WEST VIRGINIA.

FILED NOVEMBER 20, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 357.

WILLIAM B. DANIELS AND DENNIS M. DANIELS, PLAINTIFFS IN ERROR,

vs.

EDWARD TEARNEY AND WILLIAM L. WILSON, EXECUTORS OF COLIN C. PORTER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF JEFFERSON COUNTY, STATE OF WEST VIRGINIA.

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1 *Petition.*

COLIN C. PORTER'S EX'ORS
ag't
BENJAMIN F. DANIELS, &c.

To any judge of the Supreme Court of the United States:

Your petitioners, William B. Daniels and Dennis M. Daniels, respectfully represent that they are aggrieved by a final judgment of the highest court of law and equity of the State of West Virginia, to wit, the supreme court of appeals of said State, sitting at Charlestown, Jefferson County, on the 10 day of September, 1877, in the case of Colin C. Porter's Executor's, plaintiffs below, defendants in error, vs. William B. Daniels, Dennis M. Daniels, and Benjamin F. Daniels, defendants below, and Dennis M. Daniels and William B. Daniels, plaintiffs in error, wherein was drawn in question the validity of a statute of the State of Virginia on the ground that the same was repugnant to the Constitution of the United States, to wit, an act passed by the convention of Virginia, on the 30 of April, 1861, entitled "An ordinance to suspend proceedings in certain cases and to provide against the sacrifice of property," and the decision of said court was in favor of the validity of said stat-
2 ute, as will appear by the record which accompanies this petition.

And in said suit there was a right, privilege, and immunity claimed by the petitioners under the Constitution of the United States, and the decision of said State court was against the right, privilege, and immunity so claimed and relied on under such Constitution, as will also appear by the record hereto appended.

Wherefore your petitioners pray for a writ of error directed to the judge of the circuit court of Jefferson County, West Virginia, to which court said judgment was certified, and in which it was entered on the 11th day of October, 1877, and wherein the record now remains.

WILLIAM B. DANIELS,
DENNIS M. DANIELS,
By DANIEL B. LUCAS,
Their Attorney.

(Indorsed:) Colin C. Porter's Ex'rs v. W. B. Daniels, &c. Petition, &c.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the circuit court of Jefferson County, State of West Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edward Tearney and William L. Wilson, executors of Colin C. Porter, deceased, plaintiffs, and William B. Daniels, Dennis M. Daniels, and Benjamin F. Daniels, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States,
4 and the decision was in favor of such their validity; or wherein

was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said defendants, William B. Daniels and Dennis M. Daniels, as by their complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-third day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas.

M. R. WAITE,
Chief Justice Sup. C't U. S.

5 The United States of America, to Edward Tearney and William L. Wilson, executors of Colin C. Porter, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of Jefferson County, West Virginia, wherein William B. Daniels and Dennis M. Daniels are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-third day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

M. R. WAITE,
Chief Justice Sup. C't U. S.

(Indorsed:)

WEST VIRGINIA,
Jefferson County:

Due and legal service of within citation acknowledged by defendants in error this 27th day of October, 1877.

EDWARD TEARNEY &
WM. L. WILSON,
Ex'ors of Colin C. Porter, dec'd,
Per WM. L. WILSON.

6 Supreme Court of the United States.

COLIN C. PORTER'S EXECUTORS
vs.
WILLIAM B. DANIELS, DENNIS M. DANIELS, and Benjamin F. Daniels.

Know all men by these presents that we, William B. Daniels, Dennis M. Daniels, & James H. Moore, are held and firmly bound unto William L. Wilson & Edward Tearney, as executors of Colin C. Porter, in the sum of three thousand & ninety-four & $\frac{36}{100}$ dollars, to be paid to the said executors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, as witness our hands & seals this 19th day of October, eighteen hundred seventy-seven.

W. B. DANIELS. [SEAL.]
DENNIS M. DANIELS. [SEAL.]
JAS. H. MOORE. [SEAL.]

Whereas the above-named William B. Daniels and Dennis M. Daniels have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of appeals of West Virginia:

Now, therefore, the condition of this obligation is such, that if
7 the above-named William B. Daniels and Dennis M. Daniels shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

W. B. DANIELS. [SEAL.]
DENNIS M. DANIELS. [SEAL.]
JAS. H. MOORE. [SEAL.]

Signed, sealed, delivered, and acknowledged by the said obligors before me, in my office, on the day of the date thereof.

Teste:
F. P. LYNCH,
D'y Clerk Cir. Court of Jefferson County, W. Va.

STATE OF WEST VIRGINIA,
Jefferson County, to wit:

James H. Moore, the security in the foregoing bond, maketh oath & says that after the payment of his own debts and those for which he is bound as security for others and expects to be obliged to pay, he believes himself to be worth $3,094.36 (three thousand and ninety-four dollars and thirty-six cents), the penalty of the within bond.

Given under my hand this 19 day of October, 1877.

F. P. LYNCH,
D'y Clk Cir. C't.

Approved Oct. 23, 1877.

M. R. WAITE,
Chief Justice Sup. C't U. S.

8 I certify that the foregoing is a true copy from the original.

Teste:
B. C. WASHINGTON,
Clerk Cir. C't

(Indorsed:) Colin C. Porter's Ex'ors ag't William B. Daniels, &c Copy of appeal bond. Oct'r 19, 1877. Returned October 23, 1877. Teste. B. C. Washington, clerk cir. c't, Jeff. Co., West Va.

9 Pleas at the court-house in Charlestown before the circuit court of Jefferson County, and State of West Virginia, on Wednesday, the 28th of April, 1875.

Be it remembered that heretofore, to wit, on the 21st day of June, 1873, came Colin C. Porter, by his attorneys, and sued out of the clerk's office of the said court a writ of summons against Benjamin F. Daniels and others, which writ, with the endorsement and return thereon, is in the words and figures following:

Summons.

The State of West Virginia to the sheriff of Jefferson County, greeting:

We command you that you summon B. F. Daniels, Wm. B. Daniels, and D. M. Daniels to appear at the clerk's office of our circuit court of Jefferson County, at the court-house of the said county, on the first Monday in next month, to answer Colin C. Porter in an action of debt for $232.72, damages $232.72, and have then and there this writ.

Witness Robert T. Brown, clerk of our said court, at the court-house, the 21st day of June, 1873, and in the 10th year of our State.

ROBERT T. BROWN.

Action of debt. Faulkner & Faulkner, P. Q.

Return.

10 Executed by delivering a true copy of the within summons to Wm. B. Daniels June 23rd, 1873. Not executed on B. F. Daniels, he not being a resident of this State.

W. A. MORGAN, *D. S.*,
For E. TEARNEY, *Sheriff.*

Executed on the defendant, D. M. Daniels, June 26th, 1873, by delivering a copy of the within to him in person.

E. TEARNEY,
Sheriff.

And at another day, to wit, at rules held in the clerk's office of the said court, on the 7th of July, 1873, came the plaintiff, by his attorneys, and filed his declaration against the defendants, which declaration is in the words and figures following, to wit:

Declaration.

STATE OF WEST VIRGINIA,
Circuit Court of Jefferson County, to wit:

Colin C. Porter complains of Benjamin F. Daniels, Wm. B. Daniels, and D. M. Daniels, who have been duly summoned, &c., that they render unto him the sum of $232.72, which to him they owe, and from him unjustly detain, for that the said defendants heretofore, to wit, on the 1st day June, 1861, at the county aforesaid, made their joint and several bond, signed with their proper signatures and sealed with their seals, by which they bound themselves to pay to the plaintiff the
11 sum of $232.72 aforesaid when thereto requested, to which bond there is a condition attached in the words and figures following, to wit:

"The condition of the above obligation is, that whereas a writ of fieri facias was issued from the clerk's office of the county court of said county, on the 25th day of March, 1861, in the name of Colin C. Porter, against Benjamin F. Daniels, for the sum $99.27 costs, with interest thereon, to be computed after the rate of 6 per cent. per annum from the 1st day of January, 1861, until paid, also $14.61 cents costs, including sheriff's commissions and fee for taking this bond. If, therefore, the said B. F. Daniels, Wm. B. Daniels, and D. M. Daniels shall well and truly pay the said debt, interest, and costs, when the operation of an ordinance 'to provide against the sacrifice of property and to suspend proceedings in certain cases,' adopted by the convention of Virginia, April 30, 1861, ceases, then this obligation to be void, else to remain in full force and virtue."

And the plaintiff avers that the operation of the ordinance of the said convention has long since ceased, and yet the defendants, altho' often requested so to do, have not, nor has either, or any of them, paid to the said plaintiff the said sum of $232.72, with interest from
12 the 1st day of January, 1861, nor any part thereof, nor have they, or any or either of them, paid the $14.61 cents, including the sheriff's commissions and fee for taking said bond, nor any part thereof, but the same to pay the said defendants, and each and all of them, have heretofore neglected and refused, and still neglect and refuse to pay, whereby an action has accrued to the plaintiff to demand and have the penal sum mentioned in said bond, to be discharged by such damages as the plaintiff has sustained, which damages he fixes at the sum of $232.72 cents, and therefore he sues.

FAULKNER & FAULKNER, *P. Q.*

And defendants, Wm. B. Daniels and D. M. Daniels, appear, by counsel, and craving oyer of the writing obligatory in the declaration named, demur to said declaration.

And afterwards, at rules held in the clerk's office of the said court, on the second of August, 1873, the suit abated by return as against the defendant B. F. Daniels. The plaintiff joins issue in the demurrer, and gives a rule against the defendants W. B. Daniels and D. M. Daniels to plead.

And at rules held in the clerk's office of the said court on the first of September, 1873, judgment nil dicit against the defendants
13 W. B. Daniels and D. M. Daniels.

And afterwards, at a term of the said court continued and held on the 4th of November, 1873 this day came the parties, by their attorneys, and the defendants withdraw their demurrer to the plaintiff's declaration in this case, and plead conditions performed and conditions not broken, and the plaintiff replies generally, and issues are joined and leave is granted the defendants to plead specially within sixty days, and this cause is continued until the next term.

The following is a copy of the pleas referred to in the foregoing order:

Pleas.

The defendants, Wm. B. Daniels and D. W. Daniels, who sever in their defence to plaintiff's action of debt upon the penalty of $1,597.18, as in the declaration mentioned, come and defend, &c., and plead.

1st. Condition performed.

2nd. Condition not broken.

And for further special pleas, they say:

3d. That there is not and was not at any time any such ordinance "adopted by the convention of Virginia, April 30, 1861," as in the
14 declaration and in the condition of the writing obligatory mentioned.

4th. That the convention of Virginia, previously organized and sitting on the 30th of April, 1861, was not a legislative body in any manner clothed with power to authorize or direct the taking of the writing obligatory as in the declaration mentioned.

5th. That the sheriff of Jefferson County required and took said writing obligatory from the principal defendant, Benjamin F. Daniels, in discharge of his property levied on under the execution in the declaration mentioned, and that the same by reason thereof is void and of no effect.

These pleas are filed to each of the defendants severally and separately, and are repeated as applicable to the smaller case between the same parties.

And at another term of the said court continued and held on the 17th day of April, 1874.

And now came the *the* defendant Benjamin F. Daniels, the principal in the bond in the declaration in this case mentioned, and upon whom no process was served, and asked to be admitted to defend said suit, and was permitted to file his plea of payment, and to demur
15 to the declaration.

And at another term of the said court continued and held on the 24th day of October, 1874.

In this case, the death of the plaintiff, Colin C. Porter, is suggested, and by consent of the parties this cause is revived in the name of Edward Tearney and W. L. Wilson, his executors.

And this day came the parties, by their attorneys, and this cause coming on to be heard upon the special pleas heretofore filed by the defendants, and a demurrer by the plaintiff to said pleas and joinder in demurer, and the same having been argued by counsel, it is considered by the court that the demurrer to the said pleas be sustained and that the said pleas be overruled.

And at another day of the said term, to wit, the 10th day of November, 1874; this day came the parties, by their attorneys, and the cause coming on to be heard upon the general demurrer filed by the defendant, Benjamin F. Daniels, to the declaration of the plaintiff and joinder in said demurrer was argued by counsel.

Whereupon, it is considered by the court that the demurrer be
16 overruled, and the plaintiff replied generally to the plea of payment filed by said defendant, and issue is joined therein, and this case is continued until the next term.

Judgment.

And afterwards, at a term of the said court continued and held on the 28th day April, 1875, being the day and year first herein mentioned, this day came the parties, by their attorneys, and the defendants by leave of the court filed a special plea, marked A, in bar of the plaintiff's demand, to which the plaintiff demurred generally, and the defendants joined in demurrer, and the same was argued by counsel. On consideration whereof, the court sustained the said demurrer and overruled said special plea, and the defendants excepted; and the parties having waived a jury and agreed to submit the case to the decision of the court, it is considered by the court the *the* plaintiff recover of the defendants the sum

of $232.72 cents, the debt in the declaration mentioned, to be discharged by the payment of $211.73 cents with interest from the 27th day of April, 1875, and the costs of the said suit.

On motion of the defendants, execution on this judgment is suspended for sixty days.

17 The following is a copy of the plea, marked A, and referred to in the foregoing order:

Exhibit A.

For further plea to this action, the defendants say the bond in the declaration mentioned was executed by Benjamin F. Daniels, a citizen of the State of Illinois, as principal, and by William B. Daniels and Dennis M. Daniels, as sureties, in pursuance of the requirements and conditions of a statute passed in violation of the Constitution of the United States, heretofore, to wit, on the day of , 1861, by the convention of the State of Virginia, and that said statute was subsidiary to and in aid of & in furtherance of the objects and policy of the ordinance of secession passed theretofore by said convention, to wit, on the day of April, 1861, in violation of the Constitution of the United States.

And the defendants say that they rely on the fact that said statute and ordinance were in violation of and repugnant to the Constitution of the United States for their defence and plea in this case; and that they are unconstitutional, the defendants are ready to verify.

ANDREW HUNTER,
DANIEL B. LUCAS,
Attorneys for Defendants.

18 STATE OF WEST VIRGINIA, *to wit:*

At a supreme court of appeals held in Charlestown, in the county of Jefferson, on the 10th day of September, 1877.

COLIN C. PORTER'S EXECUTORS, PLAINTIFFS below, defendants in error,
agt.
BENJAMIN F. DANIELS, WILLIAM B. DANIELS and Dennis M. Daniels, defendants below, plaintiffs in error.

Upon a supersedeas to a judgment of the circuit court of Jefferson County, rendered on the 28th day of April, 1875.

The court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment rendered in this cause by the circuit court of the county of Jefferson, on the 28th day of April, 1875.

It is therefore considered by the court that the said judgment be, and the same is hereby affirmed, and that the defendants in error recover against the plaintiffs in error their costs about their defence in this court in this behalf expended, and damages according to law,
19 which is ordered to be certified to the circuit court of Jefferson County.

A copy of the record.

Attest:

O. S. LONG, *Clerk.*

STATE OF WEST VIRGINIA,
Jefferson County, to wit:

I, B. C. Washington, clerk of the circuit court in and for the county and State aforesaid, do certify that the foregoing is a true copy from the records of the said circuit court.

In testimony whereof I hereunto set my hand and affix the seal of the said court, at Charlestown, this 31st day of October, 1877.

[SEAL.] B. C. WASHINGTON,
Clerk Cir. Ct.

STATE OF WEST VIRGINIA,
Jefferson County, to wit:

I, John Blair Hoge, sole judge of the circuit court of Jefferson County, and State of West Virginia, do certify that B. C. Washington, who hath given the preceding certificate, is *is* clerk of the said court, and that his attestation is in due form.

Given under my hand this 31st day of October, 1877.

JNO. BLAIR HOGE.

20 STATE OF WEST VIRGINIA,
Jefferson County, to wit:

I, B. C. Washington, clerk of the circuit court of Jefferson County, West Virginia, do hereby certify that the Hon. Jno. Blair Hoge, whose name is subscribed to the foregoing certificate, was at the time of so doing, and still is, the judge of the third judicial circuit of the State of West Virginia, including the counties of Berkley, Morgan & Jefferson, duly thereunto elected, commissioned, and qualified, according to the constitution and laws of the State of West Virginia, and to all his acts as such full faith and credit ought to be given in courts of justice as thereout.

In testimony whereof I hereunto subscribe my name and affix the seal of the circuit court of Jefferson County at Charlestown, this 31st day of October, 1877.

[SEAL.] B. C. WASHINGTON, *Clerk.*

(Indorsement on cover:) No. 357. William B. Daniels and Dennis M. Daniels, plaintiffs in error, vs. Edward Tearney and William L. Wilson, executors of Colin C. Porter, dec'd. West Virginia Jefferson County cir. ct. Filed 20th November, 1877.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 358. 97

WILLIAM B. DANIELS AND DENNIS M. DANIELS, PLAINTIFFS IN ERROR,

vs.

EDWARD TEARNEY AND WILLIAM L. WILSON, EXECUTORS OF COLIN C. PORTER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF JEFFERSON COUNTY, STATE OF WEST VIRGINIA.

FILED NOVEMBER 20, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 358.

WILLIAM B. DANIELS AND DENNIS M. DANIELS, PLAINTIFFS IN ERROR,

vs.

EDWARD TEARNEY AND WILLIAM L. WILSON, EXECUTORS OF COLIN C. PORTER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF JEFFERSON COUNTY, STATE OF WEST VIRGINIA.

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1 *Petition.*

COLIN C. PORTER'S EXR'S
v.
BENJAMIN F. DANIELS, &C.

To any judge of the Supreme Court of the United States:

Your petitioners, William B. Daniels and Dennis M. Daniels, respectfully represent that they are aggrieved by a final judgment of the highest court of law and equity of the State of West Virginia, to wit, the supreme court of appeals of said State, sitting at Charlestown, Jefferson County, on the 10th day of September, 1877, in the case of Colin C. Porter's executors, plaintiffs below, defendants in error, vs. William B. Daniels, Dennis M. Daniels, and Benjamin F. Daniels, defendants below, and Dennis M. Daniels and William B. Daniels, plaintiffs in error, wherein was drawn in question the validity of a statute of the State of Virginia on the ground that the same was repugnant to the Constitution of the United States, to wit, an act passed by the convention of Virginia on the 30th of April, 1861, entitled "An ordinance to suspend proceedings in certain cases, and to provide against the sacrifice of property." And the decision of said court was in favor of the
2 validity of said statute, as will appear by the record which accompanies this petition; and in said suit there was a right, privilege, and immunity claimed by the petitioners under the Constitution of the United States, and the decision of said State court was against the right, privilege, and immunity so claimed and relied on under such Constitition, as will also appear by the record hereto appended.

Wherefore your petitioners pray for a writ of error directed to the judge of the circuit court of Jefferson County, West Virginia, to which court said judgment was certified, and in which it was entered on the 10th day of October, 1877, and wherein the record now remains.

WILLIAM B. DANIELS,
DENNIS M. DANIELS,
By DAN'L B. LUCAS,
Their Attorney.

(Indorsed:) Colin C. Porter's ex'rs v. William B. Daniels, &c. Petition, &c.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of Jefferson County, State of West Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edward Tearney and William L. Wilson, executors of Colin C. Porter, deceased, plaintiffs, and William B. Daniels, Dennis M. Daniels, and Benjamin F. Daniels, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their
4 validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or com-

mission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendants, William B. Daniels and Dennis M. Daniels, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-third day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas.

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

5 The United States of America, to Edward Tearney and William L. Wilson, executors of Colin C. Porter, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of Jefferson County, West Virginia, wherein William B. Daniels and Dennis M. Daniels are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-third day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

(Indorsed:)

WEST VIRGINIA,
Jefferson County:

Due and legal service of within citation acknowledged by defendants in error this 27th day of October, 1877.

EDWARD TEARNEY &
WM. L. WILSON,
Ex'ors of Colin C. Porter, dec'd,
Per WM. L. WILSON.

COLIN C. PORTER'S EXECUTORS
ag't.
WILLIAM B. DANIELS, DENNIS M. DANIELS, and Benjamin F. Daniels.

Know all men, by these presents, that we, William B. Daniels, Dennis M. Daniels, and William F. Alexander, are held and firmly bound unto William L. Wilson and Edward Tearney, as executors of Colin C. Porter, in the sum of four hundred and sixty-five $\frac{44}{100}$ dollars, to be paid to the said executors, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents; as witness our hands and seals this 19 day of October, eighteen hundred and seventy-seven.

W. B. DANIELS. [SEAL.]
DENNIS M. DANIELS. [SEAL.]
WM. F. ALEXANDER. [SEAL.]

Whereas the above-named William B. Daniels and Dennis M. Daniels have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action, by the supreme court of appeals of West Virginia:

Now, therefore, the condition of this obligation is such that if
7 the above-named William B. Daniels and Dennis M. Daniels shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

W. B. DANIELS. [SEAL.]
DENNIS M. DANIELS. [SEAL.]
WM. F. ALEXANDER. [SEAL.]

Signed, sealed, delivered, and acknowledged by the said obligors before me in my office, on the day of the date of the within bond.

Teste:

F. P. LYNCH,
D'y Clerk Cir. Ct. Jeff. Co., W. Va.

STATE OF WEST VIRGINIA,
Jefferson County, to wit:

Wm. F. Alexander, the security in the foregoing bond, makes oath and says that after the payment of his own debts and those for which he is bound as security for others, and expects to be obliged to pay, he believes himself to be worth $465.44, the amount of the penalty of the within bond.

Given under my hand this 19 day of October, 1877.

F. P. LYNCH,
D'y Clerk Cir. Court Jeff Co., W. Va.

Approved October 23rd, 1877.

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

certify that the foregoing is a true copy of the original bond.

Teste:

B. C. WASHINGTON,
Clerk Circuit Court Jeff. Co., W. Va.

(Indorsed:) Colin C. Porter's ex'ors v. William B. Daniels, &c. Copy of appeal bond, Oct'r 19, 1877. Returned October 23, 1877. Teste, B. C. Washington, clerk cir. ct. Jeff. Co., West Va.

8 Pleas at the court-house in Charlestown, before the circuit court of Jefferson County, and State of West Virginia, on Wednesday, the 28th day of April, 1875.

Be it remembered that heretofore, to wit, on the 21st day of June, 1873, came Colin C. Porter, by his attorneys, and sued out of the clerk's office of the said court a writ of summons against Benjamin F. Daniels, & others, which writ, with the endorsement and return thereon, is in the words and figures following:

Summons.

The State of West Virginia to the sheriff of Jefferson County, greeting:

We command you that you summon Benjamin F. Daniels, William B. Daniels, and Dennis M. Daniels to appear at the clerk's office of our circuit court of Jefferson County, at the court-house of the said county, on the first Monday in next month, to answer Colin C. Porter in an action of debt for $1,597.18, damages $1,579.18, and have then there this writ.

Witness Robert T. Brown, clerk of our said court at the court house, the 21st day of June, 1873, and in the 10 year of our State.

ROBERT T. BROWN.

An action of debt. Faulkner & Faulkner, p. q.

Return.

Executed by delivering a true copy of within summons to William B. Daniels, June 23, 1873. Not executed on B. F. Daniels, he not
9 being a resident of this State.

W. A. MORGAN, *D. S.*,
For ED. TEARNEY, *Sheriff.*

Eexcuted on the defendant D. M. Daniels, June 26, 1873, by delivering a copy of the within to him in person.

E. TEARNEY, *Sheriff.*

And at another day, to wit, at rules held in the clerk's office of the said court on the 7th day of July, 1873, came the plaintiff by his attorneys, and filed his declaration against the defendants, which declaration is in these words:

Declaration.

STATE OF WEST VIRGINIA,
Circuit Court of Jefferson County, to wit:

Colin C. Porter complains of Benjamin F. Daniels, Willaim B. Daniels and D. M. Daniels, who have been duly summoned, &c., that they render unto him the sum of $1,597.18, which to him they owe and from him unjustly detain; for that the said defendants, heretofore, to wit, at the county aforesaid, on the first day of June, 1861, made their joint and several bond, signed with their proper signature and sealed with their seals, by which they bound themselves to pay to the plaintiff the said sum of $1,597.18, when thereto requested, to which bond there is a condition attached in the words and figures following, to wit:

"The condition of the above obligation is, that whereas, a writ of fieri facias was issued from the clerk's office of the county court of said
10 county, on the 25th day of March, 1861—name of Colin C. Porter against Benjamin F. Daniels, for the sum of $747.92, with interest thereon to be computed after the rate of 6 per cent. per annum from the 2 day of January, 1860, until paid, also $31 97 cents, including sheriff's commission, and fee for taking this bond. If therefore the said B. F. Daniels, Wm. B. Daniels, and D. M. Daniels shall well and truly pay the said debt, interest and costs, when the operation of an ordinance 'to provide against the sacrifice of property, and suspend proceedings in certain cases,' adopted by the convention of Virginia, April 30, 1861, ceases. then this obligation to be void, else to remain in full force and virtue."

And the plaintiff avers that the operation of the ordinance of the said convention has long since ceased, and yet the defendants, though often requested so to do, have not nor has either, or any of them, paid to the said plaintiff the said sum of $747.92, with interest from the 2nd day of January, 1860, nor any part thereof, nor have they, or any, or either of them paid the $31.97 costs, including sheriff's commissions and fee for taking said bond, nor any part thereof, but the same to pay the said defendants, and each and all of them, have heretofore neglected and refused, and still neglect and refuse to pay, whereby an action has accrued to the plaintiff to have and demand the penal sum mentioned in said bond, to be discharged by such damages as the plaintiff has
11 sustained, which damages he fixes at the sum of $1,597.18, and therefore he sues.

FAULKNER & FAULKNER, *P. Q.*

And the defendants Wm. B. Daniels and D. M. Daniels, appear by counsel and craving oyer of the writing obligatory in the declaration mentioned demur to said declaration.

And afterwards, at rules held in the clerk's office of the said court, on the 2nd August, 1873, the suit abated as against the defendant B. F. Daniels by return. The plaintiff joins in demurrer, and gives a rule against the defendants W. B. Daniels and D. M. Daniels to plead.

And at rules held in the clerk's office of the said court on the 1st of September, 1873. Judgment nil dicit against the defendants W. B. Daniels and D. M. Daniels.

Pleas.

The defendants W. B. Daniels and D. M. Daniels, who sever in their defence to the plaintiff's action of debt upon the penalty of $1,597.18, as in the declaration mentioned, come and defend, &c., and plead—

1st. Conditions performed.

2nd. Conditions not broken.

And for further special pleas they say:

3rd. That there is not and was not at any time any such ordinance "adopted by the convention of Virginia, April 30, 1861," as in the declaration and in the condition of the writing obligatory mentioned.

12 4th. That the convention of Virginia, previously *previously* organized and sitting on the 30 of April, 1861, was not a legislative body in any manner clothed with power to authorize or direct the taking of the writing obligatory as in the declaration mentioned.

5th. That the sheriff of Jefferson County required and took said writing obligatory from the principal defendant, Benjamin F. Daniels, in discharge of his property levied on under the execution in the declaration mentioned, and that the same by reason thereof is void and of no effect.

These pleas are filed as to each of the defendants, severally and separately, and are repeated as applicable to the smaller case between the same parties.

And afterwards, to wit, at a term of the said court continued and held on the 4th day of November, 1873.

This day came the parties by their attorneys, and the defendants with draw their demurrers to the plaintiff's declaration in this case, and pleaded conditions performed and conditions not broken, and the plaintiff replies generally and issues are joined, and leave is granted the defendant to plead specially within sixty days, and this cause is continued until the next term.

And at another term of the said court continued and held on the 17 of April, 1874.

And now came the defendant Benjamin F. Daniels, the principal in the bond in the declaration in this cause mentioned, and upon
13 whom no process was served, and asked to be admitted to defend said suit, and was permitted to file his plea of payment and to demur to the declaration.

And afterwards at another term of said court continued and held on the 24 of October, 1874.

In this case the death of the plaintiff Colin C. Porter is suggested, and by consent of the parties this cause is revived in the name of Edward Tearney and William L. Wilson, his executors.

And this day came the parties by their attorneys, and this cause coming on to be heard upon the special pleas heretofore filed by the defendants and a demurrer by the plaintiff to said pleas, and joinder in demurrer, and the same having been argued by counsel, it is considered by the court that the demurrer to said pleas be sustained and that the said pleas be overruled.

And at another day of the said term, to wit, the 10th day of November, 1874.

This day came the parties by their attorneys and the cause coming on to be heard upon the general demurrer filed by the defendant Benjamin F. Daniels, to the declaration of the plaintiff, and joinder in said demurrer, and was argued by counsel. Whereupon it is considered by the court that the said demurrer be overruled; and the plaintiff replied generally to the plea of payment filed by said defendant, and issue is joined therein, and this cause is continued until the next term.

And afterwards, to wit, at a term of the said court continued
14 and held on the 27th of March, 1875.

This day the defendant Benjamin F. Daniels tendered his affidavit in the form required by the act of Congress of July 27, 1866, as amended by the act of March 2, 1867, for the removal of this cause into the circuit court of the United States for the district of West Virginia; also his petition for the removal of said cause under said acts, which affidavit and petition are ordered to be filed.

And at another day of the said term, to wit, the 27 of April, 1875, Benjamin F. Daniels, one of the defendants in this case, having presented his petition at an early day of the court asking the removal of this cause into the circuit court of the United States for the district of West Virginia, based upon his affidavit required by the act of Congress of July 27, 1866, as amended by the act of March 2, 1867, and also presented a petition and the required affidavit for the removal of this cause to the said circuit court of the United States for the district of West Virginia, based upon the act of Congress of the 3rd of March, 1875, and having filed the necessary bonds, with sufficient security, and the same having been argued by counsel, it is considered by the court that the said petition be denied.

Judgment.

And now at another day of said term, to wit, the 28th of April, 1875, being the day and year first herein mentioned.

This day came the parties by their attorneys, and thereupon
15 the defendants, by leave of the court, filed a special plea marked A in bar of the plaintiff's demand, to which the plaintiff demurred generally, and the defendants join in the demurrer, and the same was argued by counsel.

On consideration whereof the court sustained the said demurrer and overruled said special plea and the defendants excepted, and the *the* parties having waived a jury and by consent submitted the case to the decision of the court, it is considered by the court that the plaintiff recover of the defendants the sum of $1,597.18, the debt in the declaration mentioned, to be discharged by the payment of $1,515.94 with interest from the 27th day of April, 1875, and the costs of this suit.

On motion of defendants execution is suspended for sixty days on this judgment.

In this case the defendant Benjamin F. Daniels excepted to the judgment of the court entered on yesterday overruling his petition for the removal of the cause to the circuit court of the United States.

The following is a copy of the plea marked A and referred to in the foregoing order:

EXHIBIT A.

For further plea to this action the defendants say that the bond in the declaration mentioned was executed by Benjamin F. Daniels, a citizen of the State of Illinois, as principal, and by Wm. B. Daniels and D. M. Daniels as his securities, in pursuance to the requirements and conditions of a statute passed in violation of the Constitution of the United States,

heretofore, to wit, on the 30th of April, 1861, by the convention
16 of the State of Virginia, and that said statute was subsidiary to and in aid of and in furtherance of the objects and policy of the ordinance of secession passed theretofore by said convention, to wit, on the . day of April, 1861, in violation of the Constitution of the United States.

And the defendants say that they rely on the fact that said statute and ordinance were in violation of and repugnant to the Constitution of the United States for their defence and plea in this case; and that they are unconstitutional the defendants are ready to verify.

ANDREW HUNTER,
DANIEL B. LUCAS,
Att'ys for Defendants.

Mandate of supreme court of appeals of West Virginia.

STATE OF WEST VIRGINIA, *to wit:*

At a supreme court of appeals held in Charlestown, in the county of Jefferson, on the 10th day of September, 1877.

COLIN C. PORTER'S EX'ORS, PLAINTIFFS BELOW, DEFENDANTS IN ERROR,
ag't
WILLIAM B. DANIELS, DENNIS M. DANIELS, BENJAMIN F. DANIELS, DEFENDANTS BELOW, WILLIAM B. DANIELS, AND DENNIS M. DANIELS, PLAINTIFFS IN ERROR.

Upon a supersedeas to a judgment of the circuit court of Jefferson County rendered on the 28th day of April, 1875.

17 The court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment.

It is therefore considered by the court that the judgment rendered in this cause by the circuit court of the county of Jefferson on the 28th day of April, 1875, be and the same is hereby affirmed, and that the defendants in error recover against the plaintiffs in error their costs about their defence in this court in this behalf expended, and damages according to law, which is ordered to be certified to the circuit court of Jefferson County.

A copy from the record.

Attest:

O. S. LONG, *Clerk.*

18 STATE OF WEST VIRGINIA,
Jefferson County, to wit:

I, B. C. Washington, clerk of the circuit court in and for the county & State aforesaid, do certify that the foregoing is a true copy from the records of the said circuit court.

In testimony whereof I have hereunto set my hand and affix the seal of the said court at Charlestown the 30th day of October, 1877.

[SEAL.] B. C. WASHINGTON,
Clerk Cir. C't.

STATE OF WEST VIRGINIA,
Jefferson County, to wit:

I, John Blair Hoge, only judge of the circuit court of Jefferson County and State of West Virginia, do certify that B. C. Washington, who hath given the preceding certificate is clerk of the said court, and that his said attestation is in due form.

Given under my hand this 30 day of October, 1877.

JNO. BLAIR HOGE.

STATE OF WEST VIRGINIA,
Jefferson County, to wit:

I, B. C. Washington, clerk of the circuit court of Jefferson County, West Virginia, do certify that the Hon. Jno. Blair Hoge, whose name is subscribed to the foregoing certificate, was at the time of so doing

19 and still is the sole judge of the third judicial circuit of the State of West Virginia, including the counties of Berkeley, Jefferson, and Morgan, duly thereunto elected, commissioned, and qualified according to the constitution and laws of the State of West Virginia, and to all his acts as such full faith and credit ought to be given in courts of justice as thereout.

In testimony whereof I do hereunto subscribe my name and affix the seal of the circuit court for Jefferson County, at Charlestown, this 30th day of October, 1877.

[SEAL.] B. C. WASHINGTON,
Clerk.

(Indorsement on cover:) No. 358. William B. Daniels and Dennis M. Daniels, plaintiffs in error, vs. Edward Tearney and William L. Wilson, executors of Colin C. Porter, deceased. West Virginia, Jefferson County cir. c't. Filed 20th November, 1877.

REC'D. 358—2

OFFICE SUPREME COURT U.S.
FILED
DEC 1 1939
CHARLES ELMORE CROPLEY
CLERK

Supplement to the record of the case in the Supreme Court of the United States of Benj. F. Daniels, &c., plaintiff in error, vs. Collin C. Porter's executors, defendants in error, in obedience to one of the the rules of the court.

Porter's ex'rs vs. Daniels et al. (Two cases.) Decided September 10, 1877.

A bond taken by a sheriff, in whose hands there was an execution payable to the plaintiff in the execution, and taken pursuant to the ordinance of the Virginia Convention, adopted April 30, 1861, entitled "An ordinance to provide against the sacrifice of property, and to suspend proceedings in certain cases," which bond was conditioned that the obligors should well and truly pay the debt, interests, and costs for which the execution issued, when the operation of said ordinance ceases, is valid as a common-law bond, even if this ordinance is null and void.

Two actions of debt were pending in the Circuit Court of Jefferson County, in which C. C. Porter's executors were plaintiffs, and Benjamin F. Daniels, William B. Daniels, and Dennis M. Daniels were defendants, in each of which judgments were rendered against said defendants on the 28th April, 1875. To each of these judgments a *supersedeas* was allowed, and the cases were heard together in this court.

The Hon. John Blair Hoge, judge of the third judicial circuit, rendered the judgments below.

The following statement of the cases was prepared by Green, president, who delivered the opinion of the court.

There were two separate actions of debt brought in the Circuit Court of Jefferson County, by Collin C. Porter, in his lifetime, against the defendants, on two several joint and several bonds, executed by the defendants to him, each dated June 1, 1861; the first for $232.72, and the second for $1,597.18, to each of which a condition was attached, reciting, the first, that on March 25, 1861, a *fi. fa.* had issued from the clerk's office of the county court of said county, in the name of Collin C. Porter, against Benjamin F. Daniels, for $99.27, with interest thereon from January 1, 1861, and $14.61 costs; and the other, that on March 25, 1861, a *fi. fa.* had issued from said clerk's office, in the name of Collin C. Porter, against Benjamin F. Daniels, for $747.92, with interest thereon from January 2, 1860, and $31.47 costs; and each proceeding as follows: "If, therefore, the said B. F. Daniels, William B. Daniels, and

D. M. Daniels shall well and truly pay the said debt, interest, and costs, when the operation of an ordinance 'to provide against the sacrifice of property, and to suspend proceedings in certain cases,' adopted by the Convention of Virginia, April 3, 1861, ceases, then this obligation to be void; else, to remain in full force and virtue." These bonds were given pursuant to the ordinance of the convention aforesaid, it being the forty-second ordinance of said convention, the second section of which provides that, "Where executions of *fieri facias* have issued and are now in the hands of officers, whether levied or not, if the debtor offer bond and security for the payment of the debt, interest, and costs, when the operation of this ordinance ceases, the property shall be restored, and the bond so taken shall be returned, as in the case of a forthcoming bond, and shall constitute a lien on the realty of the obligors, to the same extent and in the same manner as forfeited forthcoming bonds returned to the clerk's office now do; and judgment may be had on said bonds in the same manner and by the same proceedings as judgments may be obtained on forthcoming bonds under existing laws." And the eighth section of said ordinance provided that it should remain in force until repealed or changed by the convention or the general assembly of Virginia, and if not so repealed, should expire at the end of thirty days after the first day of the next general assembly of Virginia.—(See appendix of Session Acts of Virginia of 1861, p. 34.) This ordinance was repealed by the eighth section of an act passed by the legislature of Virginia, March 29, 1862; but it was expressly provided that such repeal should not affect any right established, accrued or accruing under, or remedy or relief provided by, said second section of said ordinance.—(See Session Acts of Virginia of 1861-2, p. 97.)

The declarations on these bonds were in the usual form, but were demurred to in each case, the counsel for defendant insisting that this ordinance was null and void; and this being the case, that said bonds *were* not good as common-law bonds, and no recovery could be had on them. The circuit court overruled the demurrer, and several pleas were offered, whose object *was* to raise the same questions in another form; these pleas were all rejected by the court. The pleas were: 1st. That there was no such ordinance. 2d. That said Convention of Virginia was not clothed with power to authorize or direct the taking of such bonds. 3d. That the sheriff required and took said bond from the principal in them, B. F. Daniels, in discharge of his property levied on under the said executions, by reason whereof they were void; and, 4th, that said ordinance was subsidiary to, and in furtherance of the objects and policy of secession, and were, therefore, unconstitutional and void.

Pleas of conditions performed and conditions not broken were filed, and general replications thereto; and issues were joined; and the parties having waived a jury, and agreed to submit the

cases severally to the court for decision, the court in each case rendered a judgment for the debt in the declaration mentioned, to be discharged, in the first named case by the payment of $211.73, with interest from April 27, 1875, and costs; and in the second case, to be discharged by the payment of $1,515.94, with interest from the 27th day of April, 1875, and costs.

These suits were brought June 21, 1873, and final judgments rendered therein April 27, 1875, to which judgments writs of error and *supersedeas* were awarded.

Daniel B. Lucas for defendants below and plaintiffs in error.

Charles J. Faulkner for plaintiffs below and defendants in error.

GREEN, PRESIDENT, delivered the opinion of the court.

The first question presented by these cases is, admitting, for the sake of argument, that the ordinance of the Virginia Convention, under which the bonds sued upon were taken, was null and void, were the bonds valid as common-law bonds? The mere fact that a bond not authorized by law has been taken by an officer, does not render such bond invalid at common law. Such bonds have been frequently held void at common law, but wherever so held, it has been not simply because taken by an officer without authority, but for other and sufficient reasons appearing in each particular case. Such as that they were not voluntarily executed; that they were given to the officer to induce him to violate his duty as such officer; or to induce him to perform a duty he was bound to perform without the giving of such bond; that the taking of the bond was oppressive, and it was given without consideration; that the obligee in the bond had no interest in the subject-matter; that the taking of the bond was a violation of public policy, or was executed under circumstances, or contained provisions, which would have rendered a private bond void at law. If, on the other hand, such a bond is not liable to these or other sound objections, it has been constantly held valid at common law; the mere fact, that it was taken by an officer who was unauthorized by law to take such a bond, has never been held sufficient to render the bond invalid as a common-law bond. The books are full of cases which illustrate these principles. As examples of cases in which such bonds have been held void, because not voluntarily given, see *Byers* v. *The State*, 20 Ind., 47; *Germond, &c.* v. *The People*, 1 Hill, 343; *Commonwealth* v. *Kelly*, 9 Gray, 259; *Boston* v. *Capen*, 7 Cush., 116. In these cases the bond was executed to avoid an imprisonment by the officer, or other penalties, to which the party was not legally liable; and in consonance with these common-law principles, the legislature of Virginia, by an act passed October, 1748, (see 5 Henning's Statutes at Large, 518, ch. 10, § 6,) enacted that "it should not be lawful for any sheriff to take any obligation of or for any person in his custody, for or concerning any matter relating to his office, otherwise payable than to himself as sheriff, and

dischargeable upon the prisoner's appearance, and rendering himself at the day and place required in the writ whereupon he was arrested. And every obligation by any sheriff, taken in other manner or form by color of his office, shall be null and void; except in any special case any other obligation is or shall be by law particularly and expressly directed." And this, or a somewhat similar provision of law, has been ever since in force. The present provision is: "No officer, by color of his office, shall take any obligation otherwise than is directed by law, of or for any person in his custody; if he does, the same shall be void."—(See Code of West Virginia, chapter 41, section 12.) In the case of *Syme* v. *Griffin*, 4 H. & M., 277, the court decided that a prison-bounds bond taken by a sheriff, with a faulty condition and with a clause to save harmless the sheriff, was void. They based their opinion in part on the statute of 1748, but partly on the ground that the clause to save the sheriff harmless encouraged the officer in the neglect of a duty imposed upon him, to take the proper steps to re-arrest the prisoner if he escaped, and was, therefore, contrary to public policy. In the subsequent case of *Hooe* v. *Tibbs et ux.*, 1 Munf., 501, the court seemed to think that this act of assembly had no reference to parties in execution, but only to such persons as were under arrest under mere process; and that a prison-bounds bond improperly taken to the plaintiff, though it might be void as a statutory bond, was valid as a common-law bond. And in Massachusetts, in the case of *Clapp's Adm'x* v. *Cofran*, 7 Mass., 98, it was held expressly that such a bond, drawn payable to the plaintiff, was good as a common-law bond. The court says: "Bonds for ease and favor are void; but they are given, not to the creditor, but to the sheriff, to obtain from him a favor and indulgence, to which the debtor is not legally entitled. If a debtor in execution will voluntarily, without fraud, imposition, or duress, give a bond to his creditor, conditioned that he will continue a true prisoner without escaping, such a bond is not against the common law nor any statute; the creditor is not obliged to take such informal bond as his indemnity against an escape, for he may notwithstanding charge the sheriff in an action for the escape."

In the case of *Moore* v. *Allen., &c.*, 3 J. J. Marshall's R., p. 612, it was held, that a bond taken by a jailer to himself, that a prisoner should keep within certain prison bounds, in a case, which there was no authority to take any prison-bounds bond, but in which it was the duty of the jailer to keep the debtor prisoner, was held void at common law; the court holding that the jailer "as an officer, accepted the bond as the price for a violation of his duty." Other cases have been decided, where such a bond unauthorized by law has been held void as a common-law bond for like reason, it being regarded as contrary to public policy to take such bond. See *Mitchell* v. *Vance, &c.*, 5 Munroe, 528, where the bond was given to indemnify the sheriff for selling certain property

levied on, which the law required him to sell without the giving of such bond. And in the case of *The Commonwealth* v. *Jackson's ex'r, &c.*, 1 Leigh, 531, a bond taken by the hustings court of Williamsburg, was held void as contrary to public policy. The court, without authority of law, had appointed a collector of public taxes and taken from him bond with security for the collection and payment of the taxes, the bond being payable to the governor and his successors; the bond was held void. The policy of the law requiring that public taxes should be collected and accounted for by public officers duly appointed.—(See, also, *Olds, &c.*, v. *The State*, 6 Blackf., 91.) And for a similar reason a bond executed to the state, conditioned that an officer should faithfully perform his duties as commissioner of a certain fund, which belonged to a certain county, was held void; the law requiring the bond to be given to the board of commissioners of the county, though the court say that if the fund had belonged to the state, this bond, though unauthorized by law, might have been held good as a common-law bond. See *Marshall* v. *The State*, 8 Blackf., 162; and in the case of *Stuart* v. *Lee, Governor, &c.*, 3 Call, 421, a sheriff's bond in the penalty of £10,000 payable to the governor and his successors, instead of being as the law required in the penalty of £1,000, payable to the justices, was held void; it was not a voluntary bond, as the law compelled the sheriff to execute a bond. And it could not, as a common-law bond, be enforced by the successor of the governor. A bond given by a dealer in ardent spirits, under an unconstitutional act of the legislature, was held void as a common-law bond, as it was without consideration and involuntarily executed.—(*Cassell* v. *Scott*, 17 Ind., 514.) On the other hand, many cases have been decided in which bonds taken by officers from parties who voluntarily executed them for sufficient consideration, though unauthorized by law, have been held valid as common-law bonds, there being no sound objection to the validity of them. Thus in *Hay, &c.*, v. *Rogers*, 4 Mon., 226, it was held that an appeal bond taken by a clerk upon a writ of error *coram vobis*, and *supersedeas* being awarded by a court who had no jurisdiction over the subject-matter was held valid, as the bond was voluntarily executed, and the *supersedeas* had been endorsed by the clerk at the request of the obligors, and the writ of error and *supersedeas* was actually prosecuted, the obligees taking no exception to the jurisdiction of the court. It has also been held, where the law required the penalty of a constable's bond to be fixed by the county board, that a bond given in a penalty fixed by the obligors, the county board having omitted to fix the penalty, was valid as a common-law bond, it having been entered into voluntarily and for a sufficient consideration.—(See *State* v. *Lynch*, 6 Blackf., 396.) The cases of *Hooe* v. *Tibbs et ux.*, 1 Munf., 501, and *Clapp's admr'x* v. *Cofran*, above referred to, are instances, in which unauthorized bonds taken by officers even when the party was in custody, *have*

been held valid as common-law bonds. In the case of *Thomas, Judge* v. *White*, 12 Mass., 367, it was held that a bond, given to a probate judge, which was unauthorized by law, was a good common-law bond, as the obligors, by executing the bond, consented to make the probate judge the trustee for the person interested in the sum secured. In numerous other cases it has been held, that unauthorized bonds taken by officers were not, for this reason only, invalid as common-law bonds; but we will from the numerous cases of this character select a few only, which resemble closely the case before us. In the case of *Moore* v. *Hudson et al.*, 5 Mass., 314, an officer, to whom a writ of replevin was directed and delivered, took from the plaintiff in his own name a bond conditioned that the plaintiff should prosecute his replevin to final judgment and recover the goods on final judgment then the obligation was to be void, or else remain in full force, when the law authorized only a bond to be taken in the name of the defendant in replevin, conditioned that the plaintiff in replevin shall prosecute his suit, and also make return, and pay the damages, if judgment be rendered against him. The court held the bond nevertheless valid as a common-law bond. The principles involved in this case have been acted upon by the Court of Appeals of Virginia, and in my judgment they must control the decision of the cases before us. In the case of *Johnstons* v. *Meriwether*, 3 Call, 523, a forthcoming bond was taken, payable to the coroner himself, who levied the execution, instead of to the plaintiff in the execution. The condition of the bond, too, was greatly variant from that prescribed by the statute, it being: "The condition of the above obligation is such that whereas, the said Meriwether this day took into his possession sundry slaves (naming them) by virtue of an execution issued from the general court, amounting to £564 5d., including costs; now, if the said slaves, *together with as many more, under as good a title as the above slaves*, are delivered to the said Meriwether *when required, on the same plantation*, for sale, then the above obligation to be void; otherwise to remain in full force." The court below decided this to be a valid common-law bond; and the court of appeals unanimously refused to grant a writ of error to this judgment, after an elaborate argument. This decision was approved in *Hewlett* v. *Chamberlayne*, 1 Wash., 367. In this case the defect in the forthcoming bond was, that it failed to recite the amount of the debt due on the execution. The court below held this to be a defect fatal to it as a statutory bond, and refused to award an execution upon it, on motion; yet when sued on afterwards as a common-law bond, it sustained the action; and the court of appeals approved this judgment.

I will not assert that all these cases, which I have cited, were correctly decided, but I may safely assert that not one of them can justly be urged as an authority for pronouncing the bonds sued on in these cases, as invalid as common-law bonds, even if we admit

that the ordinance of the Virginia Convention, under which they were taken, was inoperative. The principles laid down by Chief Justice Parsons in the case of *Moore* v. *Hudson et al.*, 5 Mass., 314, which have been followed in Virginia, seem to me to settle beyond controversy the validity of these bonds as common-law bonds. In showing their application, I cannot do better than to use language almost identical with his language in delivering the opinion of the court in that case. If the defendant in the execution in these cases had tendered the sheriff sufficient forthcoming bonds, and this ordinance of the convention was a nullity, and the sheriff had refused to receive them, he would be answerable to the defendant in the execution for damages. But as the defendants in these cases have executed bonds which would be defective as forthcoming bonds, but executed them voluntarily to obtain or retain possession of the property, and the sheriff has thereupon permitted the defendant in the execution to obtain or retain the possession of his property; the plaintiff in the execution might, if he chose, accept the bonds offered, and pursue a remedy at law upon them against the obligors, unless the bonds be void by common law or by statute.

Bonds for ease and favor are void, not only by common law, but by our statute before cited; but a bond for ease and favor is given to the officer having the custody of the body to obtain an indulgence unauthorized by law. These therefore are not bonds for ease and favor Bonds given to an officer to indemnify him for breach of duty, or to induce him to perform a duty which he was legally bound to perform without the giving of such bonds, are likewise void at common law; but these are not bonds of this description. Indeed, I do not recognize any principle of common law by which the bonds in these cases are void at law. If they be void, they must be so in consequence of some statute, and there is no statute which in any manner avoids them; as we have seen, our statute before cited has no application to cases like these.

It may be urged that these bonds are more inconvenient to the obligors than forthcoming bonds would have been. The obligors were not required to give these bonds; and if formal forthcoming bonds had been tendered, and said ordinance of the Virginia Convention had been void, the sheriff must have accepted these forthcoming bonds or have been answerable to the defendant in the execution for all damages sustained by his refusal; and, besides, these bonds can hardly be considered more prejudicial to the obligors than forthcoming bonds would have been. But if these bonds were adjudged void, the consequence to the plaintiff will be mischievous. The defendant in the execution, under color of these bonds, has obtained or retained possession of his personal property, which the plaintiff had a right, if said ordinance of the Convention was void, to subject to the payment of his debts; and he would have no remedy but an action against the sheriff, which

might be very inadequate; and it would be unreasonable to allow the defendants to dispute these bonds voluntarily given by them after their principal had been allowed to have the full benefit of them as legal bonds. But without regarding the inconvenience which may result to either party, these bonds must be good, unless they be declared void by the common or statute law; and I know of no law by which they are made void. It is true, one of the special pleas, offered and rejected in these cases, alleges that the sheriff *required* and took these bonds in discharge of the property levied upon. But as this property levied upon was legally held by the sheriff, his refusal to surrender it unless these bonds were given did not render the giving of them involuntary, but simply shows they were given for a sufficient consideration. We have thus far assumed that the ordinance of the Virginia Convention, under which these bonds were taken, was void. It is unnecessary to consider whether this assumption is well founded, for if this ordinance is valid, then these bonds, taken in exact accordance with the requirements of this ordinance, are valid; and, as we have seen, this ordinance, being formally repealed by the Virginia Legislature in 1862, then ceased. So that these bonds became binding on the obligors and required them to pay the amount of the debts named in the conditions, when said ordinance was repealed.

The circuit court, therefore, did not err in overruling the demurrer in these cases, or in rejecting any of the special pleas offered. These special pleas, according to the views above expressed, were of matters entirely immaterial; and issues joined on them would have been immaterial issues. Even had I entertained different views from those above expressed, I do not think that the points intended to be raised, were properly raised by pleas such as those offered, even were it proper to raise them by pleas at all. Most, if not all of the questions, proposed to be raised by these pleas, were questions of law, which were properly raised by the demurrers to the declarations. But it is unnecessary to decide the form in which these questions ought to have been raised, as there was, as we have seen, no real defence disclosed by any of these special pleas.

The judgment of the Circuit Court of Jefferson County in each of these cases must be affirmed with costs in this court and damages according to law.

Judgments affirmed.

SUPREME COURT

OF THE

UNITED STATES.

Nos. 357 and 358.

WILLIAM B. DANIELS AND DENNIS M. DANIELS, Plaintiffs in Error,

VS.

EDWARD TEARNEY & WILLIAM L. WILSON, Executors of Colin C. Porter, deceased.

In Error to the Supreme Court of Appeals of West Virginia.

BRIEF OF DANIEL B. LUCAS,

FOR THE APPELLANTS.

Supreme Court of the United States.

NO. 357 AND 358.

BRIEF OF DANIEL B. LUCAS FOR APPELLANTS.

On the 18th day of April, 1861, the Convention of the State of Virginia passed her memorable Ordinance of Secession, whereby she sought to dissolve her connection with the other United States.

Upon the 30th of the same month, the same Convention passed a law entitled "an ordinance to provide against the sacrifice of property, and to suspend proceedings in certain cases." This ordinance was commonly called a *Stay-law*, and was a provision looking to armed resistance to the authority of the United States, and a state of civil war consequent thereon.

The Ordinance of Secession had not yet been ratified by the popular vote. In the scale against ratification undoubtedly the danger of an immediate depreciation of all property, under forced sales by execution or distress, weighed heavily. It was to mitigate this apprehension, that this *Stay-law* was passed. It was as a reassurance to the commercial world, and a *douceur* to embarrassed debtors.

Jefferson county, West Virginia, was at that time a border county of Virginia. One of her citizens, Colin C. Porter, had obtained two judgments against one B. F. Daniels, one for the sum or $747.92, with interest from the 2d day of January, 1860, $31.97 cents costs of suit, and the other for $99.27, with interest from January 1, 1861, and $14.61 costs. On the 25th day of March 1861, *fieri facias* had issued upon these judgments, and having been levied on the property of the debtor, B. F. Daniels, he gave two bonds in pursuance of the said *stay-law*, each in a penalty double the amount of the respective judgments, conditioned as

prescribed by the ordinance, with William B. and Dennis M. Daniels as his sureties, and dated the 1st day of June, 1861.

These bonds were carefully preserved during the war, and no action was instituted upon them during the continuance in power of that political organization which had adhered to the Union, as against the armed forces of secession. Subsequently, however, when the sceptre had passed into hands supposed to be more latitudinarian in the construction of those rights in the vain defence of which secession itself had expired, the plaintiff, having bided his time, brought suit upon his *stay-law* bonds in the Circuit Court of the county of Jefferson.

The only defence interposed which it is necessary to notice, is the one involving those questions of constitutional law, which when insisted upon by the defendants, gave to this court appellate jurisdiction. Their main plea will be found in the printed record page 7, and is as follows: (The references are to the record of the larger suit, No. 358.)

"For further plea to this action, the defendants say that the bond in the declaration mentioned was executed by Benjamin F. Daniels, a citizen of the State of Illinois, as principal, and by William B. Daniels and D. M. Daniels, as his securities, in pursuance to the requirements and conditions of a statute passed in violation of the Constitution of the United States, heretofore, to-wit, on the 30th of April, 1861, by the convention of the State of Virginia; and that said statute was subsidiary to, and in aid of, and in furtherance of the objects and policy of the Ordinance of Secession, passed theretofore by said convention, to-wit, on the 18th day of April, 1861, in violation of the Constitution of the United States.

And the defendants say that they rely on the fact that said statute and ordinance were in violation of and repugnant to the Constitution of the United States, for their defence and plea in this case, and that they are unconstitutional the defendants are ready to verify."

To this plea the plaintiff demurred, and the Circuit Court sustained the demurrer. An appeal was then taken to the Supreme Court of Appeals of West Virginia, and that tribunal, in an opinion of considerable length, sustained the Circuit Court, thus, in effect, deciding, (as I maintain), that the Ordinance of Secession of Virginia was *constitutional.*

The discussion of a series of consecutive propositions, all logically connected, must lead us to a solution of the question at issue.

The Ordinance of Secession of Virginia passed April 18, 1861, has been decided to be unconstitutional.

Texas v. White, 7 Wall. 700.

All acts subsidiary thereto, and in aid thereof are likewise unconstitutional.

Sprott v. United States, 20 Wall. 459.

Taylor v. Thomas, 22 Wall. 479.

Therefore, the stay-law of April 30, 1861, was *unconstitutional*, because this law was a corollary to, and obviously in aid of the Ordinance of Secession, which it was intended to commend to the popular vote, and thus inaugurate rebellion.

A bond executed in pursuance of an unconstitutional law is contrary to public policy, and therefore void. Let it be observed, that a bond intended to be in pursuance of a statute, but void as a statutory bond for want of conformity thereto, may nevertheless be good as a common law bond. Or a bond intended to be in pursuance of a law which has expired by its own limitation; or which, in point of fact, was never applicable to that particular case; may, though invalid as a statutory obligation, still be good as a common law bond.

Thomas, Judge, v. White, 12 Mass. 367.

Moore v. Hudson, &c., 5 Mass. 314.

Holbrook v. Klenert, 113 Mass. 268.

Johnstons v. Merriwether, 3 Call. 523.

Hewlett v. Chamberlayne, 1 Wash. 367.

These principles are ably argued in the opinion of Judge Green, accompanying the decision of the Court of Appeals of West Virginia in this case. But the argument was superfluous—his conclusions were our concessions. The question which he ought to have argued, but which he guardedly and sedulously abstained from discussing, was this: Supposing a law to be UNCONSTITUTIONAL and for *that reason*, void: is an obligation taken in pursuance thereof, valid, either as a statutory, or common law bond? The answer is plain—it is not valid, either as a statutory or a common law obligation. It is void as a statutory bond, because the statute itself is void; it is void as a common law bond, because all bonds taken in pursuance of an unconstitutional law,

are contrary to public policy, and bonds contrary to public policy, are, at common law, void. This bond is void for the same reason that all other bonds taken "in aid of rebellion" are void; they are contrary to public policy, because contrary to the Constitution, the integrity and inviolability of which it is of the highest public interest to preserve. If, therefore, the object of the Virginia Ordinance of Secession was rebellion, and this stay-law was in furtherance of the object of that Ordinance, it was in furtherance of rebellion; and all bonds taken in pursuance thereof were necessarily in aid of rebellion, contrary to public policy, unconstitutional, and void.

Cassell v. Scott, 17 Ind. 514.

Byers, &c., v. The State, 20 Ind. 47.

Slifer v. Howell, 9 W. Va. 391.

Bibb v. County Commr's. 44 Ala.

Hanauer v. Woodruff, 15 Wall. 439.

Sprott v. United States, 20 Wall. 459.

Taylor v. Thomas, 22 Wall. 479.

The questions above considered were raised first upon *demurrer*, which was overruled; and then by the plea marked "A," *supra*. Under the practice of West Virginia, we were entitled thus to present the issue, both as one of law, and as one of fact.

C. W. Va. p. 602, sec. 1.

DAN'L B. LUCAS,
Attorney for the Appellants.

JURISDICTION.

In the brief originally filed in this case, I did not consider the question of your jurisdiction, because it never occurred to me that it would be seriously contested.

I have since learned that the eminent counsel opposing me takes a different view, and has entertained an idea of submitting a motion to *dismiss* for want of jurisdiction.

In my investigation of the cases upon this subject, I found no exposition sufficiently accurate and comprehensive to at all satisfy my mind until I reached the case of Murdock *v.* City of Memphis, 20 Wall., 590. In that case the following series of propositions embrace the views of this court, as also an able statement of the law, governing its power of revision of decisions rendered by the highest court of any State:

1. That it is essential to the jurisdiction that it shall appear that "one of the questions mentioned in the act [of 14th February, 1867, art. 709 R. S., U. S.] must have been raised and presented to the State court."

It will be observed that the proposition does not indicate *how* it shall appear. In our case there is no difficulty upon this point, since, as we shall see, it appears by the *record*.

It is not denied that the judgment from which we appeal was a "final judgment in a suit in the highest court of a State in which a decision in the suit could be had." (See language of art. 709.) It is not denied that in said suit, as shown by the record, there was drawn in question the validity of a statute of a State, on the ground of its being repugnant to the Constitution of the United States. (See art. 709.)

Our plea, made a part of the record by bill of exceptions, is as follows:

"For further plea to this action, the defendants say that the bond in the declaration mentioned was executed by Benjamin F. Daniels, a citizen of the State of Illinois, as principal, and by William B. Daniels and D. M. Daniels, as his securities, in pursuance to the requirements and conditions of a statute passed in violation of the Constitution of the United States, hereto-

fore, to wit, on the 30th of April, 1861, by the convention of the State of Virginia; and that said statute was subsidiary to, and in aid of, and in furtherance of the objects and policy of the Ordinance of Secession, passed theretofore by said convention, to wit, on the 18th day of April, 1861, in violation of the Constitution of the United States.

And the defendants say that they rely on the fact that said statute and ordinance were in violation of and repugnant to the Constitution of the United States, for their defense and plea in this case, and that they are unconstitutional the defendants are ready to verify."

It will not be denied, therefore, that our plea did draw in question the validity of the statute or ordinance of Virginia of April 30, 1861, on the ground of its being repugnant to the Constitution of the United States. *One* of the questions, therefore, mentioned in the act was raised and presented to the State court.

But there was a second one. We claimed an "*immunity*" under the Constitution. We (the defendants below and the plaintiffs in error here) had executed a *penal bond* in pursuance of a statute which we aver was unconstitutional, and we claim immunity (exemption) from the penalty of said bond *under*—that is, by virtue of—the Constitution. If unconstitutional, the bond was contrary to public policy; and if contrary to public policy, void. This is our defense—a defense resting solely upon the Constitution and derived under it.

It cannot be denied, therefore, that *two* of the questions mentioned in the act were raised and presented to the State court.

The second proposition in the syllabus of Murdock *v.* Memphis is:

2. That said question must have been decided by the State court, or that its decision was necessary to the judgment or decree rendered in the case.

In our case the *record* shows that we raised the question of the unconstitutionality of the State statute by direct averment in our plea. (Record, p. 7.)

Our plea was demurred to and the demurrer sustained by the Circuit Court, and, as we have said, sustained also in writ

of error by the Court of Appeals of West Virginia. We claimed "immunity" from the penalty of the bond sued on under—that is to say, by virtue of—the Constitution, and the decision was against the immunity so specially set up or claimed under such Constitution. (See terms of art. 709.)

What is an "immunity"?

Upon turning to Webster's Dictionary I find the first definition: "*An exemption from an obligation.*" We claimed, under the Constitution, "exemption from the obligation" sued on. In the judiciary act the word used was "*exemption.*" In the act of 1867, "immunity" was substituted as being, perhaps, a little more comprehensive.

It will not be denied, therefore, that we claimed an "immunity" under the Constitution. And the record clearly shows that the decision was *against* such immunity or exemption. Therefore a Federal question was raised, and was actually decided; and there can be no doubt, both by the express terms of article 709 and those of Murdock *v.* Memphis, that your appellate jurisdiction has attached.

But the extraordinary argument is advanced that this court is to test its appellate jurisdiction, not by the record, but by the *opinion* of the State court, which it is admitted is no part of the record at all. A little reflection will show the fallacy, not to say absurdity, of this position. The *opinion* of the State court is in reality its *decision;* if the decision adversely rendered to an exemption claimed under the Constitution be erroneous, of course the opinion will be equally so, and thus your jurisdiction is to be precluded by the very errors which it is your province to correct!

In the case of Rector *v.* Ashley, 6 Wall., 142, this court said: "We have of late been frequently urged to look to the opinions delivered in the State courts to ascertain on what grounds their judgments were based, and the point has been one of some controversy. It is not, however, an open question. More than forty years ago the same question arose in Williams *v.* Norris, 12 Wheat., 117. The proposition was pressed upon that court for the same reason now urged, viz., that by the statutes of the State the opinions of the court are required to be filed in writing among the papers of the case; and it was then decided (the statute notwithstanding) the opinion of the

State court constituted no part of the record, and could not be looked to as the foundation on which this court would take or refuse jurisdiction."

Gibson *v.* Chouteau, 8 Wall., 314.
Armstrong, &c., *v.* Treasurer, 16 Pet., 281.

This decision of this court, so far as I have been able to ascertain from the reported cases, has never been overruled.

On the contrary, in the comparatively recent case of Angle *v.* N. W. M. Life Ins. Co., 92 U. S., 327, this court defined the office of the certificate (which in that case included the *opinion*) of the State court in accordance with the views announced in former cases, as follows: "The same cases also establish the further rule, that the office of the certificate, as it respects the Federal question, is to make more specific and certain that which is too general and indefinite in the record, but is incompetent to originate the question."

Again, in N. Y. Life Ins. Co. *v.* Hendren, 92 U. S., 286, it is said: "Our jurisdiction over the decisions of the State courts is limited. It is not derived from the citizenship of the parties, but from the questions involved and decided. *It must appear in the record, or we cannot proceed.*"

Still more recently, in *ex-parte* Smith, 94 U. S., 456, this court said: "The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions."

If the *opinion* of the State court cannot be resorted to for authority to take jurisdiction, neither can it be resorted to for authority to refuse; if it cannot originate jurisdiction, but can only be used to render more specific and certain that which is too general and indefinite, neither can it be used to destroy jurisdiction when the record plainly shows that the Federal question arose, and that no correct judgment could be rendered without deciding it.

In order to understand the importance of construing your jurisdiction to cover all claims of right or privilege under the Constitution, it becomes necessary to consider the origin of the Federal jurisdiction which we now invoke.

The Federal judicial power extends not only to cases arising

under the *laws* of the United States, but to cases arising under the Constitution, and was so extended by special provision added in convention. Of this provision Mr. Curtis says: "The just and successful operation of the Constitution, therefore, required that, by some comprehensive provision, all judicial cases arising under the Constitution, laws, or treaties of the United States—whether the question should grow out of the action of a State Legislature, or the action of any department of the General Government—should be brought within the cognizance of the national judiciary. This provision was added by the convention. It completed the due proportions and efficacy of this branch of the judicial power." (2 Curtis Hist. Const. U. S., p. 430.) Again: "One of the leading purposes for which this branch of the Government (the judicial) was established, was to enable the Constitution to operate upon individuals, by securing their obedience to its commands, and by protecting them in the enjoyment of the rights and privileges which it confers." (*Id.*, p. 432.)

And again: "The citizen lives under the protection and is subject to the requirments of a written fundamental law. No department of the national or any State government can lawfully act otherwise than according to the powers conferred, or the restrictions imposed by that instrument. If the citizen believe himself to be aggrieved by some action of either government which he supposes to be in violation of the Constitution, and his complaint admit of judicial investigation, he must be heard upon that question, and it must be adjudicated, or there can be no administration of the laws worthy of the name of justice." (*Id.*, p. 436.)

If, therefore, Mr. Curtis is correct in supposing that one of the main objects of conferring judicial power on the Federal Government was to protect the citizen in his rights, privileges, and immunities arising under the Constitution, when any such privilege or immunity is claimed in the highest State court, the adverse decision of that court ought to be reviewable here. And this power of review ought not to be restricted to cases wherein the *existence* of such right or immunity is denied; but, on every fair principle of reasoning, it ought to be extended to cases where the *applicability* of the right or immunity to the particular case is disputed by the State court.

In other words, the question whether or not a constitutional right is *involved*, is *itself* a Federal question. As such, the claimant has a right to have an adverse decision thereon by the State court reviewed here, because such an adverse decision is a practical denial of the right or immunity claimed. Upon the question of the existence of some immunity or privilege claimed under the Constitution, the State court, in the view which it has taken, may think the issue immaterial, or it may think that in the *form* presented the Federal issue cannot be decided. In all such cases it might be argued that although one of the questions mentioned in the section did arise, yet no decision was actually made thereon by the State court, and therefore no review would lie here.

But the fallacy consists in forgetting the fact that such questions of the *form* or *materiality* of a Federal defense are *themselves* Federal questions, and to decide adversely as to the *materiality* of a constitutional issue is practically to decide against the right, title, or immunity claimed under the Constitution. If the State court *ought* to have given efficacy to a defense under the Constitution, and has failed to do so upon whatever ground, it is an error which this court will correct. This, as I understand it, is what is meant by the syllabus in Murdock *v.* Memphis. It must appear that said Federal question must have been decided by the State court, OR that its decision was necessary before a correct judgment or decree could be rendered in the case. The force of this is, that when the citizen throws himself under the Constitution of the United States for protection, the issue thus raised shall neither be *evaded nor otherwise incorrectly adjudicated* to his prejudice without the power of reëxamination in this court. (Maguire *v.* Tyler, 8 Wall., 652.)

One of the leading purposes of your organization, according to Mr. Curtis, was to protect these constitutional rights and immunities.

Let us take an illustration. The fifth amendment to the Constitution provides: "No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury." Suppose, now, a citizen to be proceeded against under a State statute for an infamous crime by information merely without the intervention of a grand jury;

he pleads that the State law is unconstitutional; the State court overrules his plea on the ground that the proceeding, while it might not be sustainable under the statute, is good at common law.

In such a case as this, your jurisdiction would attach upon two grounds: first, because although the State court has not decided upon the question of the constitutionality of the State law, yet a decision was *necessary* to a correct judgment; and secondly, because a right, privilege, or immunity has been claimed under the Constitution, and the decision has been against the right, privilege, or immunity so claimed.

Now, our case is precisely parallel. Supposing the *opinion* of the State court to be a part of the record, (which assuredly it is not,) we find that although that court did not actually decide upon the constitutionality of the State statute, yet a decision of that question was necessary to a correct final judgment; and secondly, we find that the immunity or exemption under the Constitution set up in our plea was overruled.

In Railroads *v.* Richmond, 15 Wall., 3, it was held that where, in a suit on a contract, defended on the ground that it was rendered void by the Constitution of the United States and acts of Congress, and the exemption thus set up is overruled, the jurisdiction attaches.

This case controls ours, and, as it seems to me, the same principle gives you jurisdiction beyond reasonable controversy.

Trebilcock *v.* Wilson, 12 Wall., 687.

D. B. Lucas.

No. 42.—An Ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases.

Passed April 30, 1861.

1. *Be it ordained*, That no execution of *fieri facias* or *venditioni exponas*, other than in favor of the commonwealth and against non-residents, shall be issued from the date hereof by any court of record or magistrate, for the sale of property, until otherwise provided by law; nor shall there be any sales under deeds of trusts or decrees, unless by the consent of parties interested, until otherwise provided by law.

2. Where such executions have issued, and are now in the hands of officers, whether levied or not, if the debtor offer bond and security for the payment of the debt, interest and costs, when the operation of this ordinance ceases, the property shall be restored, and the bond so taken shall be returned as in case of a forthcoming bond, and shall constitute a lien on the realty of the obligors, to the same extent and in the same manner as forfeited forthcoming bonds returned to the clerk's office now do; and judgment may be had on said bond in the same manner and by the same proceedings as judgments may be obtained on forthcoming bonds under existing laws.

3. If the debtor offers no such bond, it shall be the duty of the officer to convene three freeholders from the vicinage, who, after being sworn, shall proceed to value the property according to what would have been its value on the sixth day of November, 1860; and unless the said property shall sell for the full amount of such valuation, it shall be restored to the debtor without lien.

4. Except in criminal cases or commonwealth's prosecutions, there shall be no trial of any cause requiring the intervention of a jury, nor upon warrants for small claims before a justice.

5. In cases of misdemeanor, juries shall be summoned from the bystanders or vicinage, and not under the law as it now

stands; and, with the consent of the party prosecuted, the cause may be tried by the court.

6. This ordinance shall not apply to liabilities upon the part of public officers, either to the State, counties, corporations, or individuals, nor to debts hereafter contracted, nor to debts due the commonwealth; provided, that no note, bill, acceptance, or other obligation the consideration of which is any debt or obligation at present existing, shall be held or considered as a debt hereafter contracted.

7. The time during which this ordinance is in force shall not be computed in any case where the statute of limitation comes in question.

8. This ordinance shall remain in force until repealed or changed by this convention, or the general assembly of the State; and if not so repealed or changed, shall expire at the end of thirty days after the first day of the next general assembly.

OFFICE SUPREME COURT U. S.
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IN THE

Supreme Court of the United States.

WILLIAM B. DANIELS AND OTHERS,

Plaintiffs in Error,

VS.

COLIN C. PORTER'S EXECUTORS,

Defendants in Error.

CHARLES J. FAULKNER,

For the Defendants in Error.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

Supreme Court of the United States.

WILLIAM B. DANIELS AND OTHERS,
PLAINTIFFS IN ERROR,

vs.

COLIN C. PORTER'S EXECUTORS,
DEFENDANTS IN ERROR.

CHARLES J. FAULKNER, for the Defendants in Error.

This is a writ of error and supersedeas to a judgment of the Supreme Court of Appeals of West Virginia. The federal question sought to be evolved from that judgment, and which is made the ground-work of this appeal, grows out of an ordinance or statute of a state convention extending to a defendant in an execution, upon a proper bond given, additional time for the payment of a private and individual debt. If such a case can warrant a review of a state adjudication by this court, its docket must be inconveniently burdened and its business multiplied beyond its physical capacity to dispose of it.

Such bonds are not novelties in the legislation of Virginia. It did not require either the anticipation or the pendency of a civil war to suggest their expediency. For more than a century the right has been accorded to every debtor in Virginia, whose goods and chattels had been levied upon by a writ of *fieri facias*, upon the execution and delivery by him to the sheriff of what is termed a

forthcoming bond, to relieve his property from the lien of the execution and to procrastinate the payment of the debt for several months. At no period in the history of that state, since 1769, has the defendant in execution been without the benefit of that indulgent provision. In April, 1861, a convention composed of delegates selected by the qualified voters of Virginia, assembled in the city of Richmond. It did not possess, nor did it claim to possess, any power to dissolve the relations then existing between that state and the federal government. In all other respects, its authority was ample, and by universal concession, embraced what are called legislative powers. On the 30th of April, it passed an ordinance or statute "to provide against the sacrifice of property and to suspend proceedings in certain cases." This ordinance did not repeal the then existing law upon the subject of forthcoming bonds (16 Peters, 362; 20 Wal., 607), but simply enlarged the day of payment to those debtors who chose to take advantage of it, to the period when the operation of the ordinance should cease, and the time of its expiration was fixed at the end of thirty days after the first day of the next general assembly, unless sooner repealed by the convention or the general assembly. It was repealed by the legislature of Virginia on the 29th of March, 1862, but it was expressly provided that such repeal should not affect any right established, accrued, or accruing under, or remedy or relief provided by, said second section of said ordinance.—(See Session Acts of Virginia of 1861–'2, page 97.)

Prior to the meeting of said convention, and before the passage of said ordinance, Colin C. Porter had, in the fall of 1860, obtained two judgments in the Circuit Court of Jefferson County, against Benjamin F. Daniels, and on the 25th of March, 1861, issued two executions of *fieri facias* which had been levied on the goods and chattels of the defendant. Whilst this execution was thus in the hands of the sheriff, levied upon the property of the debtor, this

ordinance was passed. It was optional with the defendant to have his property released by the payment of the debt, by the execution of a forthcoming bond under the law existing at the date of the judgment, or under the provisions of the second section of this ordinance. He preferred the latter, and accordingly executed and tendered to the sheriff the two bonds upon which these judgments were obtained, and he demanded and obtained the restoration of his property.

The defendants having failed to pay the money according to the condition of the bonds, actions were brought upon them as common-law obligations in the Circuit Court of Jefferson. After a lapse of near two years, and as the court was about to render judgment upon the bonds, the special plea was filed, which is made the foundation of this appeal. It was demurred to, because the matters therein set forth were immaterial, and the question proposed to be raised by the plea had already been raised by demurrer, and the demurrer sustained. Judgments were accordingly rendered on the bonds. An appeal was then taken to the court of appeals of the state, and the judgments affirmed. A reference to the opinion of the court now filed and made part of the record by one of its rules, will show that its judgment was predicated upon the concession of the *invalidity* of that ordinance; that the bonds were treated as good common-law obligations, founded upon a full and valuable consideration, and the defendants held estopped from alleging their invalidity upon the ground that they had been voluntarily executed, and had accomplished the surrender by the sheriff of his property to the principal debtor.

Upon this state of facts I shall maintain, 1st, That there is no *federal issue* involved in this record, and, consequently, that this court has no jurisdiction to review the judgment of the state court.

Perhaps no point has been more frequently the subject of adjudication by this court than the right to review the

judgment of a state court under the 25th section of the act of 1879, and the 2d section of the act of 1867, slightly modifying the former law, and now superseding it. It is wholly unnecessary to refer to these numerous cases. It is sufficient to quote a summary of the principles adjudicated by this court in the latest authoritative exposition of its views. In Citizens' Bank vs. Board af Liquidation, 8 Otto, 140, Chief Justice Waite, in delivering the opinion of the court, says: "To give us jurisdiction under section 709, Rev. Stat., it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was *controlling* in the disposition of the cause.—(Williams vs. Oliver, 12 How., 125; Klinger vs. State of Missouri, 13 Wall., 257.)" Then in referring to the case of Brown vs. Atwell, Adm., 92 U. S., 327, quoting therefrom, he says: "We have often decided that it is not enough to give us jurisdiction over the judgments of the state courts for a record to show that a federal question was argued or *presented* to that court for decision. It must appear that its decision was *necessary* to the determination of the cause, and that it *actually* was *decided*, or that the judgment as rendered could not have been given without deciding it."

In the case of Murdock vs. City of Memphis, 20 Wall., 590, Justice Miller, in examining the effect and operation of the 2d section of the act of 1867, and delivering the opinion of the court, thus says: "But we have not yet considered the most important part of the statute, namely, that which declares that it is only upon the existence of *certain questions* in the case that this court can entertain jurisdiction at all. Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been decided in the state court. Nor is it sufficient that such a question was raised and decided. It must have been decided in a *certain way*, that is, *against the right set up under the Constitution*, laws, treaties, or authority of the United States. The federal question may

have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the federal law, but if the right claimed under it by plaintiff in error *has been conceded to him*, this court cannot entertain jurisdiction of the case, so very careful is the statute, both of 1789 and 1867, to narrow, to limit, and define the jurisdiction which this court exercises over the judgments of the state courts."

The case of Cockroft vs. Vose, 14 Wall., 5, is, in all its essential facts, precisely like the case at bar, and should dispose of the question of jurisdiction.

The State of New York passed "An act to provide for the collection of demands against ships and vessels," and authorizing warrants of attachment and seizure of the vessel, much in the style of admiralty proceedings. Under this act, one Vose, professing to have claims against the vessel, had a warrant issued and the vessel seized. For the purpose of discharging the vessel from the custody of the sheriff, and in pursuance of the statute, Cockroft gave his bond to Vose. Upon that bond, given in pursuance of said statute, which was admittedly unconstitutional and void, as interfering with the commercial power of Congress, suit was instituted and judgment recovered. The Court of Appeals of New York, expressing the opinion that the statute was *invalid*, nevertheless affirmed the judgment. A writ of error was sued out to the judgment of the court of appeals. Justice Miller, in delivering the opinion of this court, says:

"It does not appear to us that the court of appeals, in which the case was decided, held the state *statute to be valid*, and if it did not, the jurisdiction of this court cannot be *invoked* to declare it *invalid*."

He further adds: "Another question may have determined the conclusion of the court, and that was whether, after the bond had been given, and the vessel released, the obligors in the bond were not *estopped* to deny the validity of the proceeding in the attachment suit."

He then adds: "If the court decided the case *on that ground, as it may have done*, or any other ground, except the validity of the statute, *we have no jurisdiction*."

It is impossible to imagine a case running more parallel to the case at bar than the one just cited.

Both were suits upon bonds executed in pursuance of statutes, and in consideration of the release of property, which statutes were claimed to be unconstitutional and void.

Upon both, judgments were obtained in the inferior courts upon common-law principles. In the Court of Appeals of New York, as in the Court of Appeals of West Virginia, these judgments were affirmed, both courts *conceding the invalidity of the statutes under which the bonds were given;* and both holding that the defendants were *estopped* from denying their validity, having recognized them by their action and benefited by their provisions.

This court did not see any federal question involved in the New York judgment, and dismissed the writ of error for want of jurisdiction; it is presumed it will find equal reason for dismissing the writ of error to the West Virginia judgment.

The counsel for the plaintiffs in error, in referring to the opinion of the president who delivered the opinion of the court of appeals, says:

"His argument was superfluous—his conclusions, our concessions. The question which he *ought* to have argued, but which he *guardedly* and *sedulously abstained* from discussing, was this: Supposing the law to be *unconstitutional*, and for that reason void, is an obligation taken in pursuance thereof valid as a statutory or common law bond?"

The court of West Virginia is not obnoxious to this charge of evasion. It has done what the counsel complains it has *not* done, but *should* have done: it has assumed the *invalidity* of the ordinance, and has proceeded to argue, with irresistible ability, that notwithstanding this concession, the defendants having availed themselves

of the provisions of the statute,—having entered into a new contract for the payment of a sum of money admittedly due to the plaintiffs, based upon the surrender of property,—they are estopped and precluded from shielding themselves from liability by *denying the validity of a statute* which they had recognized by their action, and which they had used for their own benefit. Upon a precisely similar state of facts the Court of Appeals of New York had sustained the obligation of bonds given, and this court, in the case of Cockroft vs. Vose, recognized the soundness of such reasoning.

But, secondly, I shall maintain that if the Court of Appeals of West Virginia had decided that the ordinance of the April convention, 1861, was valid, and the bonds given in pursuance thereof good statutory bonds, that such a decision would have been fully sustained by authority.

This court has been called upon in a great variety of cases, since the close of our civil war, to exercise its enlightened discrimination in solving the delicate and difficult questions which have resulted from that unhappy conflict. From this elevated standpoint it has been enabled to survey the whole field of controversy, and to apply the appropriate principles to that anomalous disturbance of our political system. There seems, in the judgment of this court, to have been but one theory that could settle all difficulties and judicially harmonize the discordant relations of that period, and that was, to regard the Union as *indestructible*, and the insurgent states as *continuing members of that Union*, still subject to the Constitution, notwithstanding their ordinances of secession and their efforts to enforce their independence by arms. This enlightened and conservative theory has led to a uniform and consistent series of adjudications which may be embraced in a few propositions.

1st. All legislation of the states clearly and manifestly intended to impair the supremacy of the national author-

ity, or the just rights of citizens under the Constitution, are held to be null and void.

2d. All other acts of legislation not manifestly so designed, but looking *to the government of the people in their relations to each other*, are upheld as valid.

3d. In carrying this discrimination into practice the court will resort to no forced or strained construction to impute a treasonable character to that legislation, but every presumption will be made in favor of its validity that can fairly and justly be done. It will not only distinguish between statutes emanating from the same "unlawful body," overthrowing what is treasonable and supporting what is free from that imputation, but it will discriminate between sections or provisions of the *same statute*, upholding such as are not in conflict with the Constitution, provided the allowed and prohibited parts are severable.—(5 Otto, page 80.)

Justice Strong, in delivering the opinion of the court in the case of The United States vs. Insurance Companies, 22 Wall., page 102, after citing extracts from previous decisions of the court in the case of Texas vs. White, 7 Wall., 700; Sproll vs. The United States, 20 Wall., 459, and Horn vs. Lockhart, 17 Wall., 580, says:

"After these emphatic utterances, controversy upon this subject should cease. All the enactments of the *de facto* legislatures in the insurrectionary states during the war, which were not hostile to the Union or to the authority of the general government, and which were not in conflict with the Constitution of the United States, or of the states, have the same validity as if they had been enactments of legitimate legislatures. Any other doctrine than this would work great and unnecessary hardship upon the people of those states, without any corresponding benefit to the citizens of other states, and without any advantage to the national government."

In Sprott vs. The United States, the prohibited acts of legislation are described to be "those perverted to the *manifest* and intentional aid of treason."

Perhaps the most accurate and comprehensive definition of those deemed unexceptionable and valid, is embraced in the remark of Justice Bradley in his dissenting opinion in the case of Keith vs. Clark, 97 U. S. Rep., 477:

"We have always held that courts ought to regard as valid all those acts of the state governments which were received and observed as laws for the government of the people *in their relations with each other.*"

The case of Keith vs. Clark, above referred to, decided October Term, 1878, being among the most recent and authoritative views of the court, deserves special notice in connection with this branch of the inquiry.

In that case the question before the court arose upon the validity of the notes issued by the Bank of Tennessee. It was a conceded fact in the case, that the notes upon which the suit was brought, were issued by the bank while the state was in rebellion against the government of the United States. The bank, though organized for the transaction of a general banking business, was also the *fiscal agent of the state.* The state was the only stockholder, and entitled to all the profits realized from the business. It was also an admitted historical fact, that the banks of the insurgent states, and especially those owned by the states, were used extensively in furtherance of the rebellion, and that all, or nearly all, of their available funds were converted, in one way or another, into Confederate securities. None of the banks owned by the states survived the rebellion, and few were able to make any considerable showing of valuable assets.

And yet, upon that state of facts, what was the decision of this court?

"It is said," says Justice Miller, delivering the opinion of the court, that "considering the *revolutionary character of the state government at the time*, we must *presume* that those notes were issued to support the rebellion."

"We cannot *infer* that those notes were issued in violation of federal authority.

"To undertake to *assume* the facts which are necessary to their invalidity in this record is to give to conjecture the place of proof, and to rest a judgment of the utmost importance on the existence of facts not found in the record, nor proved by any evidence of which this court can take judicial notice."

The Chief Justice dissented from the judgment of the court, but in doing so, gave expression to the following general propositions, in which, no doubt, all of his associates concurred:

"Every law is *presumed* to be constitutional. We cannot declare a state law repugnant to the Constitution of the United States unless it is *manifestly so*. We ought not to reverse the judgment of a state court upon a question of federal law unless it is *clearly wrong*. The decisions of the highest courts of a state are always entitled to respect in this tribunal, and should not be overruled under our constitutional power of review, except for *imperative reasons*.

"If facts *could* exist that would support a state law, we *must presume* they *did* exist when the law was passed."

The legislation complained of in this case is embraced in the 2d section of an ordinance passed by the Convention of Virginia on the 30th of April, 1861, entitled "An ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases," and is as follows:

"2. Where such executions *have issued* and are now in the hands of officers, whether levied or not, if the debtor offer bond and security for the payment of the debt, interest, and costs, *when the operation of this ordinance ceases*, the the property shall be restored, and the bond so taken shall be returned as in case of a forthcoming bond, and shall constitute a lien on the realty of the obligors to the same extent and in the same manner as forfeited forthcoming bonds returned to the clerk's office now do, and judgment may be had on said bond in the same manner and by the same proceedings as judgments may be obtained on forthcoming bonds under existing laws."—(Acts of Assembly, 1861, and Ordinances of the Virginia Convention, p. 34.)

When this statute was passed, Virginia, according to her own views and doctrines, was a member of the federal Union, nor could it be known for one month afterwards, whether the people, by their vote, would seek to dissolve the relations between Virginia and the federal government.

The counsel for the plaintiffs in error suggests that this ordinance was a *douceur* to embarrassed debtors to conciliate their support to measures of hostility to the Union. This is not a very satisfactory or philosophical mode of accounting for such legislation. There were comparatively few in the state against whom judgments had been rendered or whose property was encumbered by mortgage, and we may very naturally suppose that for every *debtor* there was a *creditor*. What, therefore, would be calculated to conciliate the one would necessarily dissatisfy the other. But there is a more satisfactory mode of tracing the motives of such legislation in the contemporaneous history of that day. Seven states, South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, had already announced their secession from the Union and were making military preparations to maintain their resolves. President Lincoln had issued his proclamation of the 19th of April and his proclamation of the blockade of the ports of those states. War was thus inevitable, whether Virginia should unite in the revolutionary movement or not. Her territory, situated between the belligerent parties, must be, more or less, the scene of civil disturbance and military operations, even if she assumed the attitude of a neutral, and she might very well, under such circumstances, have deemed it expedient to adopt the remedial measures embraced in that ordinance But this court will not attribute treasonable motives to a legislative act, unless that intent appears *plainly* and *unmistakably* on the face of the law itself. It will be rather reluctant to treat a brief *indulgence* to a *private* debtor as an act of treason, or a *forthcoming bond* as a measure of belligerency against the supremacy of the national authority.